Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-37

RAYMOND J. RYAN AND HELEN RYAN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

Neither the judgment of the court of appeals dismissing petitioners' appeal (Appendix A, p. 1a, *infra*) nor its opinion (Appendix B, pp. 2a-13a, *infra*) are reported. The order of the United States Tax Court of May 24, 1974 (Appendix C, pp. 14a-15a, *infra*) overruling petitioners' Fifth Amendment and other objections to certain interrogatories, and ordering petitioners to answer them is similarly not reported.

JURISDICTION

The judgment of the court of appeals was entered and its opinion filed on May 23, 1975. On June 16, 1975, the court of appeals stayed the issuance of its mandate for twenty days pending the filing of the instant petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether appellate review of an order of the United States Tax Court violative of petitioners' rights against self-incrimination must await the imposition of sanctions by the Tax Court which can result in the *assessment and execution* of a multi-million dollar judgment against petitioners pending appellate review unless petitioners post a bond for more than the entire judgment; where the judiciary is specifically foreclosed by rule and statute from preventing this result pending appeal; and where the potentially destructive losses and other injury to petitioners from the execution of such a judgment based on the erroneous Tax Court order are irremediable under law.

STATUTES AND RULES INVOLVED

26 U.S.C. §§ 7482(a) and 7485 appear in Appendix D, p. 16a, *infra*.

Rule 14 of the Federal Rules of Appellate Procedure appears in Appendix E, p. 17a, *infra*.

Rules 70(b) and 104(c) of the Rules of Practice and Procedure of the United States Tax Court appear, in pertinent part, in Appendix F, pp. 17a-18a, *infra*.

STATEMENT

In 1964 the Commissioner of Internal Revenue instituted an investigation of the possible tax liabilities of petitioner Raymond J. Ryan. This investigation, in the words of the Court of Appeals for the Ninth Circuit was "inspired by publicity which Ryan received when he testified as a government witness against two individuals convicted in a case reported in *Marshall* v. *United States*, 355 F.2d 999 (9th Cir. 1966)." *United States* v. *Ryan*, 455 F.2d 728, 730 n. 2 (9th Cir. 1972). The efforts of the IRS in this investigation have spawned successive indictments against Ryan for conspiracy to defraud the IRS, obstruction of justice, criminal contempt, and violation of the Foreign Direct Investment Act. He has been exonerated in all of the cases, the last one in 1973.

In June of 1969, in the midst of one of the criminal trials in California, the Commissioner of Internal Revenue filed a jeopardy assessment of more than nine million dollars against Ryan and his wife, effectively paralyzing his business activities. The jeopardy assessment was dissolved only after the Ryans had been forced to file the petition now pending in the Tax Court, and agreed to encumbrances on their property and to limitations on their right to travel. To relieve themselves of these encumbrances, the Ryans repeatedly requested a prompt trial in the Tax Court, but the case languished because the Commissioner admittedly did not have the evidence to prove his case (Tr. October 13, 1971, R. 52, p. 2).[1]

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[1] This and other record references are to the record which was transmitted to the Court of Appeals for the Seventh Circuit, Appeal No. 74-1663.

In October 1971, the Commissioner applied for an order from the Tax Court permitting him to take depositions upon written interrogatories of unnamed bank officials in Switzerland. Over the appellants' objections, the Tax Court granted the Commissioner's application, the Seventh Circuit dismissed the Ryans' appeal from the order for lack of jurisdiction and denied an alternative petition for mandamus. *Ryan* v. *Commissioner of Internal Revenue,* Nos. 72-1869 and 72-1870 (7th Cir. January 5, 1973); *Ryan* v. *Drennen,* No. 72-2006 (7th Cir. January 5, 1973), *cert. denied,* 412 U.S. 939 (1973).

On January 1, 1974, the new Rules of Practice and Procedure of the United States Tax Court took effect providing for the first time in the history of that court, discovery methods and procedures similar to those under the Federal Rules of Civil Procedure. On January 18, 1974, the Commissioner, pursuant to Rule 71 of the new Tax Court Rules, served a set of seven written interrogatories on the Ryans. The interrogatories (R. 134, pp. 3-4) sought information as to any relationships or dealings by the Ryans with the Commercial Credit Bank of Zurich, Switzerland, or with one Carl W. Hirschmann, identified as a resident of Zurich, between 1958 and 1965.

Petitioners objected to these interrogatories on the ground, *inter alia*,[2] that answers to the interrogatories

[2] Petitioners also objected to the interrogatories on the grounds that they were not relevant to the issues before the Tax Court, and that to apply the New Tax Court discovery rules at this stage of this case would, in the language of Rule 2(a) of those Rules "work injustice" on the petitioners. The Tax Court overruled these objections.

would have a tendency to incriminate and hence were privileged by the Fifth Amendment. Rule 70 of the Rules of Practice and Procedure of the Tax Court expressly limits discovery to "any matter *not privileged*" and which is relevant to the subject matter involved in the pending case (emphasis added). Petitioners pointed out in support of their apprehension in this regard that (1) a massive criminal tax investigation had been conducted against the Ryans for more than a decade, both in the United States and abroad; (2) that Mr. Ryan had been the subject of successive criminal prosecution beginning in 1968, the latest of which was concluded only in 1973; each and every criminal prosecution against Ryan involved alleged foreign transactions; and (4) that each of the foreign transactions involved in the prior prosecutions were also involved in the Commissioner's determination of deficiencies then before the Tax Court (R. 134, pp. 15-16). After the Tax Court denied their objections and directed the petitioners to answer the interrogatories, the Ryans moved for reconsideration, calling to the court's attention, *inter alia,* the additional fact that Mr. Ryan and his employees and business associates had been questioned by Federal Grand Juries (investigating possible non-tax as well as tax offenses) regarding his dealings with the Commercial Credit Bank and Mr. Hirschmann; and that Carl Hirschmann was presently an indicted fugitive from American justice and a warrant had been issued for his arrest. On July 1, 1974, the Tax Court entered an order (R. 143) denying without comment the motion for reconsideration.

The Ryans then filed an appeal from the order compelling the answers to the interrogatories and also sought mandamus from the United States Court of

Appeals for the Seventh Circuit.[3] On August 21, 1974, the court of appeals denied the Ryans' petition for a writ of mandamus and on May 23, 1975, dismissed the appeal for want of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. The effect of the court of appeals' action is that before the Ryans can obtain an appellate ruling as to whether the Tax Court's order violates their rights against self-incrimination under the Fifth Amendment, they must choose between surrendering their Fifth Amendment rights,[4] or risk the application of sanctions which might then make the validity of the Tax Court's order reviewable by a court of appeals. The court of appeals applied certain traditional standards for the reviewability of discovery orders which indicate that a witness may obtain appellate review only by disobedience of the order and appeal from the subsequent order of contempt, holding that the "consequences of failure to obey an order of the Tax Court are no greater than refusal to obey an order of a District Court" and "[i]f the Ryans do not obey the Tax Court's discovery order and the Tax Court enters a contempt order for their disobedience, they can immediately appeal from such order of sanction" (pp. 12a-13a, *infra*).

[3] After an appeal had been noted (the instant case) and a petition for mandamus filed in the Seventh Circuit, the Commissioner, *ex parte* and without notice to the Ryans, obtained an immunity order under 18 U.S.C. § 6003 from the United States District Court for the District of Columbia. That order is presently on appeal in the United States Court of Appeals for the District of Columbia Circuit.

[4] The briefest analysis of the record would confirm the fact that the order would in fact violate their rights and indeed, in its brief below, the government did not even bother to defend the order's validity.

In the view of the court of appeals, "the Ryans, . . . if they are not exaggerating, will continue their refusal and if cited for contempt can, by appealing the contempt order, obtain a ruling on the validity of the Tax Court's discovery order." (p. 13a, *infra*). In short, in the view of the court of appeals, contempt was the sole key for the Ryans in achieving review and protecting their constitutional rights.

The error in the court of appeals' resolution lies in the fact that it fails to appreciate the novel nature of the situation which the Ryans face in simply achieving review of an order which clearly violates their fundamental constitutional rights—a situation which, precisely because it arises from a Tax Court discovery order under that Court's new Rules of Procedure, differs radically from that traditionally faced by litigants or witnesses attempting to appeal from discovery orders of the District Courts prior to either a "sanction order" or a final decision in the case.

Like most litigants in the district courts, the Ryans in the Tax Court face one horn of a trilemma in that if they obey the Tax Court's order, they are being "compelled to surrender the very protection which the [Fifth Amendment's] privilege is designed to guarantee." *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951). And it is hornbook law that the breach of a privilege is irreparable injury.

Another horn facing the Ryans should they stand on their Fifth Amendment rights is their exposure to the contempt sanction, the imposition of which, according to the court of appeals, would be a "final" order and would make the validity of the underlying order compelling answers immediately reviewable on appeal.

However, there are available to the Tax Court many different sanctions (See Rule 104(c), Rules of Practice and Procedure of the United States Tax Court) ranging from outright dismissal of the Ryans' petition to any of the other sanctions provided in Rule 104(c), many of which would easily form the basis for such a dismissal and similarly result in the imposition of the multi-million dollar tax assessment which the government is seeking against the Ryans.

Were the Ryans to be impaled on *that* horn, then there would be no practical remedy available to them pending review by any appellate court (within the context of review of that final decision of the Tax Court) of the order compelling answers to interrogatories.

And this is where the Ryans' position in the Tax Court differs substantially from that of litigants in the district courts, for the effect of a dismissal of a taxpayer's petition by the Tax Court in whole or in part cannot be stayed pending appeal in the same manner as would an ordinary order or judgment of a district court under the Federal Rules of Appellate Procedure.

Rather, Rule 14 of the Federal Rules of Appellate Procedure explicitly declares Rule 8 of the Federal Rules of Appellate Procedure, providing for stays from district court decisions pending appeal, *inapplicable* to appeals from the decisions of the Tax Court. The reason for this is evident, since 26 U.S.C. § 7485 provides that "review of Tax Court decisions 'shall not operate as a stay of *assessment or collection* of any portion of the amount of deficiency determined by the Tax Court' unless a petition is timely filed *and a bond is filed in the Tax Court.*" *Churchhill Farms, Inc.* v. *Orr,* 324 F.

Supp. 713, 714 (E.D. La. 1971) (emphasis added). Section 7485 also provides, in pertinent part, that this bond should not exceed "double the amount of the portion of the deficiency in respect to which the notice of appeal is filed."

The "customary practice of the Tax Court is to fix an appeal bond *equal to the amount of the deficiency for which review is sought, plus any additions to the tax and interest running from the due date of the return until the time when the appellate review of the decision is expected to be completed*—ordinarily two and one-half years after the last day on which a Notice of Appeal could be filed." *BNA, Tax Management Portfolio,* 153-3rd, "Tax Court-Trial of a Case" p. A-23 (emphasis added).

Thus, based on the fact that even in 1969, when the government issued its Notice of Deficiency, it was already claiming a nine million dollar deficiency, the Ryans are faced with the risk that in order to have any meaningful review of the order of the Tax Court compelling answers in the face of their Fifth Amendment claim, they would have to provide a bond which could be *minimally* in the neighborhood of 12 million dollars. Absent the posting of such enormous security, the IRS would simply turn the matter over for collection by attachment and forced sale of the assets of the Ryans to satisfy the assessment irrespective of the pendency of an appeal. Even were the Ryans to be vindicated on appeal and the order compelling answers held invalid, it would be a hollow victory indeed, for as we understand the law, without the required bond, if the government seizes a taxpayer's assets and sells them at distressed prices at a forced sale under an assess-

ment ultimately held to be invalid, the government's sole obligation is to pay to the taxpayer the money actually realized from the sale, not what it might be really worth and with no compensation for any losses or damages to business, property values, etc. resulting from the invalid acts of collection. With the dollar figures which are involved in this case, such injury would not only be irreparable in nature, but could be ruinous in amount.

In short, the only way the Ryans could ensure against a financial catastrophe pending appeal (short of surrendering their Fifth Amendment rights) would be to post a potentially multi-million dollar bond. This is an unconscionably high premium to require of a citizen in order to preserve one of the most fundamental individual rights under the Constitution.

We submit that the refusal of a court of appeals to review the validity of an order of the Tax Court which has been challenged for a clear repugnance to the Fifth Amendment—and which, *precisely because it is an order of the Tax Court* (rather than of a district court) carries such a potential for extreme and irreparable injury and demands an inordinately high premium for a citizen's opportunity for meaningful appellate review of his Fifth Amendment claim—presents issues of such substantial significance as to warrant this Court's review by certiorari.

2. Additionally militating for the grant of certiorari is the novelty of the situation and the inevitability of its recurrence in future cases. Thus, the order sought to be reviewed arises from the application of the *new* Rules of the United States Tax Court (effective January 1, 1974) which for the first time provided dis-

covery in that court analogous to that available under the Federal Rules of Civil Procedure in the district courts. Since tax disputes litigated between the government and its citizens before the Tax Court most often carry the potentiality of related criminal tax prosecutions, they are extremely likely to generate valid claims of the Fifth Amendment privilege against governmental discovery demands, and accordingly the unique trilemma presented to the petitioners carries a high probability for recurrence in future Tax Court litigation under its new Rules.

The decision of the court of appeals, which carries drastic consequences affecting the fundamental rights of the petitioners, and potentially all private litigants before the Tax Court under its new Rules,[5] thus raises important and novel issues not previously passed on by this Court.

3 This Court has long recognized the fact that "the procedural aspects of the law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions"; and thus, "the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction." *DiBella* v. *United States,* 369 U.S. 121, 124, 125 (1962). These principles have been implemented by insisting that the requirement of finality is to be given "a practical rather than a technical construction," *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152 (1964), particularly where the order falls into a category of decisions which "finally determine claims of rights separable

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[5] Who are, in a very real sense, involuntary plaintiffs in the Tax Court.

from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

The decision below, however, totally ignores *Gillespie* and literally guts the "collateral order doctrine" of *Cohen* by effectively holding that where the petitioners raise *one* ground for challenging the Tax Court order which clearly falls within the "collateral order doctrine" (i.e., an order destructive of constitutional rights with no practical opportunity for effective review), they are nonetheless barred from invoking *Cohen* because they contemporaneously raised other grounds (*i.e.*, non-relevancy) in the Tax Court which were not "collateral" within the *Cohen* meaning.[6] We submit that such a formulation improperly limits a practical and salutory doctrine by forcing litigants to abandon legitimate "non-collateral" grounds for objecting to erroneous orders simply because their assertion would frustrate the immediate review they would be entitled to through the assertion of another available objection which would, in fact, qualify for review under the "collateral order" doctrine. Given the very special and unique limitations on Tax Court litigants'

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[6] The court of appeals based its action upon the decision of the Third Circuit in *Borden Company* v. *Sylk*, 412 F.2d 843 (1969), a case which refused to apply the collateral order doctrine, however, because, unlike the petitioners here, "the appellant base[d] its *entire* opposition to the discovery order on the grounds that the information sought is not relevant to the issues raised in the litigation." 410 F.2d at 846 (emphasis added).

ability to avoid irreparable injury pending appellate review of final judgments, the Seventh Circuit's novel restriction on the collateral order doctrine warrants review by this Court under its supervisory powers.

4. Finally, this Court has recently expressed concern with standards for review of interlocutory discovery orders involving privileged information and arising from the district courts. Thus, in *Kerr* v. *United States District Court for the Northern District of California,* 511 F.2d 192 (9th Cir. 1975), *cert. granted,* 43 U.S.L.W. 3621 (U.S. May 27, 1975) (No. 74-1023), the court of appeals declined to review by mandamus an order of the district court requiring production of certain documents in which a party claimed a non-constitutional privilege. The parties claiming the privilege sought certiorari to present to this Court, *inter alia,* the question of "[a]ccording to what standard should the Court of Appeals exercise discretion under Title 28, United States Code section 1651 to review interlocutory discovery orders?" (No. 74-1023, Petition at p. 7). They argued that, "[t]he standard for granting mandamus to review interlocutory discovery orders should be akin to the standard of review on appeal to which the interests at stake would be entitled but for the risk of intervening irreparable harm." (*Id.* at 29). Interlocutory review under 28 U.S.C. § 1651, they claimed, should be available "not only to cure a usurpation of power, an act in excess of jurisdiction, or a failure to exercise jurisdiction, but also *to save important public and private interests from irreparable harm attibutable to a discovery order which the district court had 'jurisdiction'* to enter, but which is clearly or plainly erroneous." (*Id.* at 29-30) (emphasis added).

On May 27, 1975, this Court granted certiorari to consider the question presented by the petitioners in No. 74-1023.

We submit that the instant case, where the petitioners initially also sought and failed to receive mandamus relief, presents the strongly analogous question on even more urgent facts. And that is whether in denying review of an order violating fundamental constitutional rights and where there may be no meaningful opportunity for review, the court of appeals has improperly failed to follow the guidelines of this Court that "the requirement of finality is to be given 'a practical rather than a technical construction,'" *Gillespie* v. *United States Steel Corp., supra,* and impermissibly limited the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp., supra.*

Private litigants who are the object of discovery orders affecting their constitutional rights and who face the grim choices which confront petitioners here most often do attempt to secure immediate appellate review and thus avoid irreparable injury by *both* appeal and mandamus, as was done in the instant case. As a practical matter, review of discovery orders either by extraordinary writ or through the recognized exceptions to the strict rule of finality would be based on the recognition that the "procedural aspects of the law deal with the practical affairs of men," *DiBella* v. *United States, supra;* the need to avoid "self-defeating judicial construction" in dealing with the concept of finality as a condition for review (*Id.* at 125); and the fundamental unfairness of permitting irreparable injury to basic rights while denying review of the offending order. We submit that the issues to be

considered in this case in regards to review by appeal appear to be directly related to the issues presented and accepted for review by this Court in No. 74-1023.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 23, 1975

BEFORE

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. PHILIP W. TONE, *Circuit Judge*

Hon. JOSEPH SAM PERRY, *Senior District Judge* *

No. 74-1663

RAYMOND J. RYAN and HELEN RYAN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court

Judgment

This cause came on to be heard on the transcript of the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said Tax Court in this cause appealed from be, and the same is hereby, DISMISSED, with costs, for want of jurisdiction, in accordance with the opinion of this court, filed this date.

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* Senior District Judge Joseph Sam Perry of the Northern District of Illinois sitting by designation.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1663

RAYMOND J. RYAN and HELEN RYAN,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the United States Tax Court, Washington.
Docket No. 4800-69
William M. Drennen, *Chief Judge.*

ARGUED FEBRUARY 26, 1975 — DECIDED MAY 23, 1975

Before SWYGERT, *Circuit Judge,* TONE, *Circuit Judge,* and PERRY, *Senior District Judge.**

PERRY, *Senior District Judge.* This is an appeal from an order of the United States Tax Court which directed petitioners below, Raymond J. Ryan and Helen Ryan, his wife [hereinafter "the Ryans"], to answer certain interrogatories served by respondent below, the Commissioner of Internal Revenue [hereinafter "the Commissioner"].

In 1964 the Commissioner instituted an investigation of the possible tax liabilities of petitioner Raymond J. Ryan [hereinafter "Ryan"]. This investigation resulted in

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

three successive indictments against Ryan for conspiracy to defraud the Internal Revenue Service, obstruction of justice, criminal contempt, and violation of the Foreign Direct Investment Act. Ryan was acquitted on the first two indictments (*United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972); *In the Matter of Ryan*, Misc. No. 1926, May 4, 1972 (C.D. Cal.)); the third indictment was dismissed by the United States District Court and an appeal noticed by the Government was dropped several months thereafter (*United States v. Ryan*, D.D.C. No. Cr 2038-72, March 2, 1973, *appeal dismissed*, United States Court of Appeals, D.C. Cir. No. 73-1354, July 13, 1973). In June of 1969, while the criminal investigation was in progress, the Commissioner filed a jeopardy assessment of more than nine million dollars against the Ryans.

The Ryans initiated the proceedings below in September of 1969 by filing a petition in the Tax Court for a redetermination of deficiencies in income taxes, including fraud penalties, asserted by the Commissioner for the taxable years 1958 through 1965. The jeopardy assessment was dissolved after the Ryans filed the aforesaid petition and agreed to the imposition of certain encumbrances on their assets and certain limitations upon their right to travel.

In October of 1971 the Commissioner applied to the Tax Court for an order permitting him to take depositions, upon written interrogatories, of unnamed bank officials in Switzerland, pursuant to the Double Taxation Convention of 1951 entered into between the United States of America and Switzerland. The Ryans objected on the grounds, *inter alia*, that said Convention did not authorize such depositions and that the rules of the Tax Court then in force did not permit discovery by either party. The Tax Court granted the Commissioner's application, and this Court dismissed the Ryans' appeal for lack of jurisdiction and denied an alternative petition for mandamus. *Ryan v. Commissioner of Internal Revenue*, Nos. 72-1869 and 72-1870, United States Court

of Appeals, 7th Cir., Jan. 5, 1973; and *Ryan v. Drennen*, No. 72-2006, Jan. 5, 1973, *cert. denied*, 412 U.S. 939 (1973).

On January 18, 1974 the Commissioner, pursuant to Rule 71 of the new Tax Court Rules of Practice and Procedure,[1] served on the Ryans seven written interrogatories seeking information as to any relationships or dealings by the Ryans with the Commercial Credit Bank of Zurich, Switzerland, or with one Carl W. Hirschmann, a resident of Zurich, between the years 1958 and 1965. The Ryans objected to these interrogatories on the ground, *inter alia*, that answers to the interrogatories would have a tendency to incriminate them and hence were privileged by the Fifth Amendment. In support of their objection, the Ryans asserted: (1) a massive criminal tax investigation of the Ryans had been conducted for more than 10 years; (2) Ryan had been the subject of successive criminal prosecutions beginning in 1968, the latest of which was concluded only in 1973; (3) each criminal prosecution against Ryan involved alleged foreign transactions; and (4) each of the foreign transactions involved in the prior criminal prosecutions is also involved in the Commissioner's determination of deficiencies now before the Tax Court.

The Commissioner moved the Tax Court to compel answers to the interrogatories and, after a hearing conducted on May 22, 1974, the Tax Court on May 24, 1974 entered an order providing, *inter alia*, "Petitioners are directed to answer in writing and under oath" the interrogatories propounded by the Commissioner. The Ryans appealed to this Court and subsequently filed in this Court a petition for writ of mandamus, seeking an order directing the Chief Judge of the Tax Court to vacate the order of May 24, 1974. In its response to said

[1] On January 1, 1974, the new Rules of Practice and Procedure of the United States Tax Court became effective, providing, for the first time, discovery methods and procedures similar to those of the Federal Rules of Civil Procedure.

petition for mandamus, the Government advised us that after the appeal and mandamus petition were docketed in this Court, the Government sought and obtained from the District Court for the District of Columbia an immunity order under 18 U.S.C. §§ 6002 and 6003. This order directed the Ryans "to give testimony or provide other information and produce documents which they refuse to give or to provide on the basis of their privilege against self-incrimination as to all matters about which they may be interrogated before the United States Tax Court", and granted the Ryans use immunity with respect to testimony or other information compelled to be given or produced under the order (or any information directly or indirectly derived from such testimony or other information). An appeal by the Ryans from the use immunity order is pending in the United States Court of Appeals for the District of Columbia Circuit.

This Court on August 21, 1974 denied the Ryans' petition for a writ of mandamus. Thereafter the Commissioner filed a motion to dismiss the instant appeal for lack of jurisdiction and, in the alternative, for mootness. This Court denied the motion, without prejudice to the Commissioner's right to raise the same issues in his brief on appeal.

One or both of two threshold issues must be addressed at the outset. We must first decide whether this Court has jurisdiction to entertain this appeal from the order of the Tax Court directing the Ryans to answer the interrogatories served upon them by the Commissioner. If we decide that this Court has such jurisdiction, we must further decide whether this appeal has become moot by virtue of the use immunity granted to the Ryans by the order of the District Court entered on August 8, 1974 pursuant to 18 U.S.C. §§ 6002 and 6003.

By the Internal Revenue Code of 1954, 26 U.S.C. § 7482(a), the Congress has granted United States Courts of Appeals exclusive jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury. As a general rule Courts of

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Appeals have jurisdiction to review only final decisions of the District Courts, 28 U.S.C. § 1291, and the courts have held that the term "final decisions" with respect to Tax Court cases generally includes decisions which specify the amount of a deficiency or lack thereof, dismiss a petition for lack of jurisdiction, or otherwise dispose of the litigation. *Licavoli v. Commissioner*, 318 F.2d 281, 283 (6th Cir. 1963); *Porter v. Commissioner*, 453 F.2d 1231, 1232 (5th Cir. 1972); *Commissioner v. S. Frieder & Sons Co.*, 228 F.2d 478, 480 (3rd Cir. 1955). By 28 U.S.C. § 1292, Courts of Appeals are empowered to review certain interlocutory decisions of District Courts, but the Ryans have not contended that any of these exceptional interlocutory decisions are applicable in the case at bar.

In *Cogen v. United States*, 278 U.S. 221 (1929), Cogen had been indicted on a charge of conspiracy to violate the National Prohibition Act. Before the indictment, certain papers had been taken from his person without a warrant. After the indictment and before trial he applied to the District Court for an order requiring the Government to return the papers and to suppress all evidence obtained therefrom on the ground that the search and seizure had been made in violation of his constitutional rights. The application was denied. Before trial, Cogen sued out a writ of error from the Circuit Court of Appeals, which then dismissed the writ, holding that the order sought to be reviewed was interlocutory and hence not appealable. The Supreme Court granted a writ of certiorari. The sole question before the Court was whether the order of denial of the District Court was a final decision. Cogen argued that the order was final, contending that his application for surrender of the papers was a collateral matter, distinct from the general subject of the litigation; that the order thereon finally settled the particular controversy and thus fell within the exception to the general rule which limits the right of review to decisions which are both final and complete. The Supreme Court disagreed, holding:

> It is not true that the order on such a motion deals with a matter distinct from the general subject of the litigation. . . . In essence, the motion resembles others made before or during a trial to secure or to suppress evidence, such as applications . . . to compel the production of books or documents . . . or for a subpoena *duces tecum* . . . The orders made upon such applications, so far as they affect the rights only of parties to the litigation, are interlocutory. . . .
>
> 278 U.S. at 223-224.

Thus *Cogen* can be read as standing for the proposition that orders compelling discovery are non-appealable interlocutory orders.

Although the Ryans concede that "numerous cases have held that a trial court's order overruling a claim of privilege and directing answers to interrogatories or production of documents is reviewable only by way of submitting to a judgment of contempt and appealing from that judgment" (Brief of Appellants at 13), they strongly contend that the Tax Court's order rejecting their asserted Fifth Amendment privilege falls within the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Ryans argue that the order falls under the *Cohen* doctrine because their claim of Fifth Amendment privilege is "separate" and "independent" from the case pending in the Tax Court in that the basis for the claim has nothing to do with the civil litigation; i.e., the basis for the claim is the *criminal* consequences that may and probably will result (Brief of Appellant at 14). We disagree.

The *Cohen* doctrine is readily distinguishable from the present issue. There, the appellate courts were confronted with a question of law which was totally independent of the issue involved in the litigation. The question—whether a deposit of security was required for the plaintiffs to proceed with the litigation—could be resolved without any reference to the substance of the action. This is in sharp contrast to the case at bar where the Ryans base their opposition to the Tax Court's discovery order partly on the grounds that the information

sought by the interrogatories is not relevant to the subject matter involved in the pending case. An apt answer to this argument is supplied by the following language of the court in *Borden Co. v. Sylk*, 410 F.2d 843 (3rd Cir. 1969):

> . . . The argument itself betrays the essentially non-collateral nature of the question, for if the propriety of the lower court's order can be determined only by making reference to the substantive litigation, then clearly it is not a "collateral" matter within the *Cohen* meaning.
>
> 410 F.2d at 846.

In the instant case the relevance of the information sought can only be resolved by reference to the substantive litigation, which concerns income tax deficiencies and fraud penalties.

The other grounds on which the Ryans base their opposition to the discovery order is that their answers to the interrogatories might tend to incriminate them. We do not minimize the importance of the Ryans' Fifth Amendment privilege, but we do not think that such claim of privilege by itself endows an interlocutory order with such importance and independence of the cause itself as to compel review. In *Alexander v. United States*, 201 U.S. 117 (1906), certain witnesses were directed to appear and produce documents before a special examiner designated by the Circuit Court for the District of Minnesota to hear testimony in a suit brought by the Government to enforce the Sherman Act. The witnesses refused to answer questions or produce documents, pleading, *inter alia*, the privilege of the Fifth Amendment. Upon petition by the Government, the court issued an order of compliance. Appeals from the order were then allowed to the Supreme Court, which dismissed the appeals for want of jurisdiction, holding that the order was a non-appealable interlocutory order, despite the fact that a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause. The grounds for the decision were stated in the following language:

> . . . In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. . . . but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. . . . This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that [time] the proceedings are interlocutory in the original suit. . .
>
> 201 U.S. at 121-122.

Likewise, in *Cobbledick v. United States*, 309 U.S. 323 (1940), the Supreme Court stated:

> . . . The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. . . .
>
> 309 U.S. at 325-326

See also, Cohen v. United States, supra.

Similarly, this Court has repeatedly held that an order to compel testimony and to produce documents is not an appealable order. *National Nut Co. of California v. Kelling Nut Co.*, 134 F.2d 532 (7th Cir. 1943); *Goodyear Tire & Rubber Co. v. Jamaica Truck Tire Service Co.*, 66 F.2d 91 (7th Cir. 1933), *cert. denied*, 290 U.S. 700 (1933).

In *National Nut* we held non-appealable an order of a District Court in Illinois in aid of a subpoena sought by the plaintiff corporation for use in its pending California suit to compel officers of the defendent corporation in the California suit to testify and produce documents. There we cited *Cobbledick, supra*, where the Supreme Court held that an order of a District Court *denying* motions to quash subpoenas *duces tecum* directing petitioners to appear and produce documents before a

grand jury was not a "final decision", and that appeal would be allowed only from a contempt order for failure to comply.

In *Goodyear*, we held a lower court order directing the issuance of a subpoena non-appealable. There, we noted, as did the Supreme Court previously in *Cobbledick* and *Alexander*, that appellate review would be available if and when the witness was punished for contempt for refusing to comply. This availability of appellate review distinguishes these cases, and *National Nut*, from the rule of *Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966), where the District Court *denied* a motion of defendants to compel a Chicago resident to answer questions at deposition and to produce documents sought by subpoena *duces tecum* for use in defending a patent infringement suit pending in the United States District Court for the Southern District of California. The defendants appealed the order denying the motion to compel testimony and to produce documents, and Lerner, the witness, moved to dismiss the appeal for lack of jurisdiction on the ground that the order was not final. We held that the order was a "final decision" on the grounds that for all practical purposes this proceeding was the defendants' only chance to obtain discovery from Lerner, and that this appeal was their only opportunity for review of the District Court's order *denying* access to the information. Thus *Carter Products*, although not cited by the Ryans, is clearly distinguishable from the case at bar.

In *United States v. Fried*, 386 F.2d 691 (2nd Cir. 1967), a non-party witness sought appellate review of an order requiring his presence for testimony on the grounds that attendance could seriously jeopardize his health. In that case, as here, the appellant relied heavily on the holding in *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964 (1965), which permitted an appeal by a non-party witness served with a subpoena requiring the disclosure of trade secrets. After reviewing the *Covey* holding, the *Fried* court rejected the appeal, electing instead to follow the rule of *Alexander, supra*, where the Supreme

Court held that a judge's order directing a witness to answer a question in the very action pending lacks the finality required to support an appeal by the witness until he decides to risk citation for contempt and a contempt order is issued. We see no reason why the instant case should not be governed by the same rule. Although the *Covey* court said that it was "not impressed" with the argument that a mere winess "may obtain review by disobedience of the order and appeal from a subsequent order of contempt", this seems to be the very argument which persuaded the Supreme Court to dismiss the appeal in *Alexander*. So far as we can ascertain, the Supreme Court has consistently stood so persuaded. Cf. *Cobbledick, supra; Di Bella v. United States*, 369 U.S. 121 (1962); *United States v. Blue*, 384 U.S. 251 (1966); *United States v. Ryan*, 402 U.S. 530 (1971). Thus we agree with the Commissioner that the interrogatories which the Ryans refused to answer, and the reasons for their refusal, *viz.*, the interrogatories were not relevant to the tax controversy and their answers might tend to incriminate them, do not demonstrate any independence of the tax controversy, which involves income tax deficiencies and fraud penalties.

The Ryans contend, next, that the "practical effect of the [Tax Court's] order will be irreparable by any subsequent appeal" (Brief of Appellants at 15), but they neglect to specify the harm or to delineate the irreparable nature of the harm which they contend they will suffer. The force of this argument thus escapes us. The consequences of failure to obey an order of the Tax Court are no greater than refusal to obey an order of a District Court.[2] If the Ryans do not obey the Tax Court's

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[2] Rule 104(c) of the Rules of Practice and Procedure of the United States Tax Court, which is prescribed by authority of 26 U.S.C. §7453, is derived from Rule 37(b), Fed. R. Civ. P., and reads as follows:

> **(c) Sanctions.** If a party or an officer, director, or managing agent of a party or a person designated in accordance with Rule 81(c) fails to obey an order made by the Court with respect to the provisions of Rules 71, 72,

(Footnote continued on following page)

discovery order and the Tax Court enters a contempt order for their disobedience, they can immediately appeal from such order of sanction. *Every* interlocutory order involves, to some degree, a potential loss or harm. That risk, however, must be balanced against the need for efficient federal judicial administration, the need for the appellate courts to be free from the harassment of fragmentary and piecemeal review of cases otherwise resulting from a succession of appeals from the various rulings which might arise during the course of litigation. See *Borden v. Sylk, supra; Cobbledick, supra.* The following words of Judge Aldisert, writing for the court in *Borden*, bear repeating:

> . . . To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. It would constitute the courts of appeals as second-stage motion courts. . .
>
> * * * *
>
> To accept the appellant's view is also to invite a geometrical increase in the already unacceptable delay between the date of filing and trial in the metropolitan district courts. The present case, filed over three years ago and now held in abeyance pending the outcome of this appeal, is a splendid example of the Homeric proportions that such litigation can assume. Our overburdened courts have little time or appetite for such protractions.
>
> 410 F.2d at 846.

The case before us, filed over five years ago and now held in abeyance pending the outcome of this appeal, is an even more splendid example of "the Homeric proportions" that such litigation can assume. To paraphrase the words of Judge Friendly in *Fried, supra*, this is no time to weaken the historic rule putting a party's sincerity to the test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to the Ryans, who, if they are not exaggerating, will continue their refusal and if cited for contempt can, by appealing the contempt order, obtain a ruling on the validity of the Tax Court's discovery order.

Holding, as we do, that the Ryans' appeal from the order of the Tax Court must be dismissed for lack of appellate jursidiction, we need not decide the question of mootness.

The appeal is dismissed for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] *Continued*

73, 81, 82, 83, 84, or 90, the Court may make such orders as to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of the Court the failure to obey any such order.

(d) Evasive or incomplete answer or response. For purposes of this Rule and Rules 71, 72, 73, 81, 82, 83, 84, and 90, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

In addition to the sanctions enumerated in Rule 104(c) above, 26 U.S.C. § 7456(d)(3) empowers the Tax Court to punish by fine or imprisonment, at its discretion, such contempt of its authority as is shown by disobedience or resistance to its lawful order or rule.

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON

Docket No. 4800-69

RAYMOND J. RYAN and HELEN RYAN, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Order

(May 24, 1974)

Argument of counsel for both parties was heard in Washington, D.C., on May 22, 1974, on respondent's "Motion to Compel Answers and Production Re Interrogatories of January 18, 1974," filed April 12, 1974, and petitioners' objections thereto, a copy of which was attached to respondent's motion as Exhibit B. Upon consideration of which, it is hereby

ORDERED, That respondent's motion is granted in the following respects:

(a) Petitioners are directed to answer in writing and under oath, in accordance with Rule 71 of the Rules of Practice and Procedure, United States Tax Court, questions 1 through 6 propounded in respondent's interrogatories, attached as Exhibit A to respondent's motion.

(b) Petitioners are also directed to answer in the same manner the first part of respondent's question number 7 propounded in his interrogatories above referred to, which reads as follows:

> "If your answer to 6 is affirmative, identify the documents."

The remainder of question 7, requesting the production of documents, is stricken and need not be complied with at this time.

(c) Petitioners' answers to respondent's interrogatories shall be served on respondent, and a copy thereof filed with this Court, on or before July 8, 1974.

(Signed) W. M. DRENNEN
Judge

Dated: Washington, D. C.
May 24, 1974

APPENDIX D

§ 7482. Courts of review

(a) Jurisdiction. — The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

• • •

§ 7485. Bond to stay assessment and collection

(a) Upon notice of appeal.—Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 7483 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a notice of appeal in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer—

(1) on or before the time his notice of appeal is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the notice of appeal is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or

(2) has filed a jeopardy bond under the income or estate tax laws.

If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the appeal bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

• • •

APPENDIX E

• • •

Rule 14. Applicability of Other Rules to Review of Decisions of the Tax Court

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.

• • •

APPENDIX F

Rule 70. General Provisions

• • •

(b) Scope of Discovery: The information or response sought through discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of the burden of proof involved. If the information or response sought is otherwise proper, it is not objectionable merely because the information or response involves an opinion or contention that relates to fact or to the application of law to fact. But the Court may order that the information or response sought need not be furnished or made until some designated time or a particular stage has been reached in the case or until a specified step has been taken by a party.

• • •

Rule 104. Enforcement Action and Sanctions

• • •

(c) Sanctions: If a party or an officer, director, or managing agent of a party or a person designated in accordance with Rule 81(c) fails to obey an order made by the Court with respect to the provisions of Rules 71, 72, 73, 81,

82, 83, 84, or 90, the Court may make such orders as to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of the Court the failure to obey any such order.

No. 75-37

Supreme Court, U.S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

RAYMOND J. RYAN AND HELEN RYAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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OPINIONS BELOW

The order of the Tax Court (Pet. App. C, pp. 14a-15a) is not reported. The opinion of the court of appeals (Pet. App. B, pp. 2a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A, p. la) was entered on May 23, 1975. The petition for a writ of certiorari was filed on July 7, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the interlocutory order of the Tax Court, compelling petitioners to answer interrogatories propounded by the Commissioner of Internal Revenue pursuant to discovery procedures of the Tax Court, is appealable as a "final decision" under 28 U.S.C. 1291.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the Fifth Amendment to the Constitution, Sections 7482 and 7485 of the Internal Revenue Code of 1954, 26 U.S.C. 7482 and 7485, and Section 1291 of the Judicial Code, 28 U.S.C. 1291, are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

This case arises out of deficiency proceedings that are still pending in the United States Tax Court.[1] In connection with those proceedings, on January 18, 1974, the Commissioner of Internal Revenue, pursuant to Rule 71 of the United States Tax Court Rules of Practice and Procedure, served petitioners with written interrogatories and a request for production of documents concerning petitioners' various business transactions and relationships with a certain Swiss bank and another named individual during the years 1958 through 1965. Petitioners objected to the propounded interrogatories, alleging, *inter alia,* that the information and documents requested were irrelevant to the deficiency determinations then awaiting adjudication and were protected from compulsory disclosure by petitioners'

[1]Petitioners initiated the proceedings below in 1969 by filing a petition in the Tax Court for redetermination of deficiencies in income taxes, including fraud penalties, asserted by the Commissioner for the years 1958 through 1965. On October 6, 1971, the Commissioner applied for an order authorizing him to request the deposition of Swiss bank officials, which the Tax Court granted on April 24, 1972. Petitioners filed a notice of appeal, and after the Tax Court denied their motion to stay execution pending the appeal, filed a petition for a writ of mandamus with the court of appeals, seeking a stay of the order pending appeal. In an order entered on January 5, 1973, the court of appeals denied the petition and dismissed the appeal on the ground that the court lacked jurisdiction because the orders were nonappealable and interlocutory, and did not come within any exception for orders separable from, and collateral to, the pending Tax Court litigation. This Court denied petitioners' petition for a writ of certiorari, 412 U.S. 939.

Fifth Amendment privilege against self-incrimination. On May 24, 1974, after a hearing on petitioners' objections, the Tax Court ordered that petitioners answer the interrogatories in writing and under oath. Petitioners filed a notice of appeal from that order on July 3, 1974. On July 26, 1974, petitioners filed a petition for a writ of mandamus with the court of appeals, seeking an order directing the Chief Judge of the Tax Court to vacate the order entered on May 24, 1974. In response to this motion, the government stated that an order had been entered by the United States District Court for the District of Columbia on August 8, 1974, granting petitioners use immunity with respect to the requested information and documents pursuant to 18 U.S.C. 6002 and ordering them to comply with the requests for information.[2] The court of appeals denied the petition for a writ of mandamus on August 21, 1974. Petitioners did not seek review of the denial of their petition.

The court of appeals dismissed the appeal on May 23, 1975, on jurisdictional grounds, holding that the Tax Court's order was a nonappealable interlocutory order.

ARGUMENT

The decision below is correct. There is no conflict of appellate decisions or other reason for further review.

1. The courts of appeals have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 7482(a) of the Internal Revenue Code of 1954, 26 U.S.C. 7482(a). With the exception of certain categories of interlocutory decisions concededly not involved here (see Pet. App. B, p. 6a), the

[2]Petitioners have appealed from the use-immunity order, and that appeal is now pending before the United States Court of Appeals for the District of Columbia Circuit, *sub nom. In re Raymond J. Ryan and Helen Ryan*, No. 74-1906.

only district court decisions falling within the statutory jurisdiction of the courts of appeals are "final decisions." 28 U.S.C. 1291. The purpose of this restriction is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (*Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546), and thereby avoid the fragmentary and piecemeal review of cases that would otherwise arise from a succession of separate appeals from the various rulings to which a litigation may give rise. See *Cobbledick* v. *United States*, 309 U.S. 323, 324-326.

In *Cogen* v. *United States*, 278 U.S. 211, 223-224, this Court held that an order compelling discovery or testimony is a nonappealable interlocutory decision notwithstanding that a constitutional privilege may have been asserted as grounds for noncompliance with the order. See also *Alexander* v. *United States*, 201 U.S. 117, 121-122; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328; *United States* v. *Ryan*, 402 U.S. 530, 532.

Petitioners nevertheless contend (Pet. 11-13) that the order of the Tax Court in this case is appealable under the "collateral order" doctrine enunciated in *Cohen* v. *Beneficial Loan Corp.*, *supra*, 337 U.S. at 546, which permits an appeal from interlocutory decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important * * * and too independent of the cause itself [to be denied immediate review]." But that doctrine does not extend to interlocutory discovery orders of the kind involved here. To the contrary, this Court consistently has held, both before and after *Cohen*, that an order compelling testimony over an objection based upon a claim of Fifth Amendment privilege is not appealable, *i.e.*, that the preliminary determination of Fifth Amendment rights that such an order entails is not a final determination of a claim "too important and too independent" to be denied immediate review. See *United States* v. *Ryan*, *supra*; *Cobbledick* v. *United States*, *supra*; *Alexander* v. *United States*, *supra*. Rather, as those

cases hold, the appealable final determination of Fifth Amendment rights in such circumstances comes only with the conviction of contempt, or other final sanction, that might be imposed upon a refusal to comply with the order.

2. Petitioners attempt to distinguish their case from such cases as *Ryan* and *Cobbledick* by claiming (Pet. 6-10) that if they refuse compliance with the Tax Court's discovery order, that court could choose to dismiss their petition, rather than convict them of contempt, and that dismissal would subject them to immediate collection of their assessed tax liability. But such immediate collection would, of course, leave petitioners in no worse position than if they had chosen to litigate their tax liabilities in a district court. As a prerequisite to instituting a refund suit in a district court, petitioners would have been required to pay their assessed tax liabilities in full. *Flora* v. *United States*, 362 U.S. 145. And the district court, like the Tax Court, would be authorized to dismiss the suit upon failure to comply with a discovery order. Rule 37(b)(2), Fed. R. Civ. P. Thus the "irreparable harm" that petitioners allege would follow from dismissal is merely the post-judgment payment of taxes that petitioners would have been required to pay prior to judgment had they originally chosen to sue for a refund in a district court (or the Court of Claims).[3] Such "harm" does not warrant the extraordinary piecemeal review that petitioners seek here.

Moreover, even upon dismissal, petitioners would be able to stay collection of their deficiency pending appeal by filing a bond. See Section 7485 of the Code. The government may prescribe the conditions under which it will subject itself to the judgment of the courts in the collection of its revenues. *Cheatham* v. *United States*, 92 U.S. 85, 88-89. Having provided access to the judicial process prior

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[3]Since the practical consequences would be the same in these circumstances whether petitioners had proceeded in a district court or the Tax Court, the fact that the Tax Court has only recently adopted the discovery rules of the district courts (see Pet. 10-11) does not provide a basis for further review of this case.

to payment of the tax in Tax Court proceedings, Congress has appropriately conditioned stay of collection pending appellate review upon the filing of a bond. The possibility that petitioners may be required to file a bond for a review of any dismissal for failure to comply with discovery orders does not constitute such irreparable harm, or such an intolerable burden on the assertion of their Fifth Amendment privilege, that immediate interlocutory appellate review is warranted. Furthermore, the Tax Court could impose sanctions that would not entail immediate collection or the filing of a bond, such as a conviction for contempt, from which an immediate appeal would lie without any security requirement.

3. Even if petitioners could secure immediate appellate review of the Tax Court's discovery order, they have no basis for opposing that order. Their Fifth Amendment privilege against self-incrimination has been amply safeguarded by the order granting them use immunity pursuant to 18 U.S.C. 6002.[4] Such an order is coextensive with their privilege against self-incrimination and protects them from the direct or derivative use in a criminal prosecution of any testimony or documents produced by them in answer to the propounded interrogatories. *Kastigar* v. *United States*, 406 U.S. 441, 453. Under the circumstances, therefore, petitioners' compliance with the discovery order will not entail any risk of self-incrimination.[5]

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[4]In the court of appeals, the government argued in the alternative that the appeal should be dismissed for mootness because the use-immunity order protected petitioners' Fifth Amendment privilege. The court of appeals did not reach the question of mootness (Pet. App. B, p. 13a).

[5]Petitioners incorrectly contend (Pet. 13-15) that their petition presents issues "directly related" to the question presented in *Kerr* v. *United States District Court for the Northern District of California*, No. 74-1023, certiorari granted, May 27, 1975. The petitioners in *Kerr*, state officials named as defendants in a suit brought by state prison inmates, have been granted review of the denial of their petition, in the court of appeals, for a writ of mandamus directing the district court to rescind its discovery order requiring "production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs" (Pet. 17). The *Kerr* petitioners contend, *inter alia*, that the court of appeals applied an improper standard in denying mandamus and that "[t]here is a need to delineate uniform standards for when mandamus should be granted to review such [discovery] orders" (*id.* at 20). The determination of that issue will have no bearing on this case, which arises on appeal and not on mandamus. Indeed, it is implicit in the fact that the *Kerr* petitioners proceeded by mandamus rather than by appeal that they recognized that review of an interlocutory discovery order—the kind of order involved here—is not available by appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX

The Fifth Amendment to the Constitution in pertinent part provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

Sections 7482 and 7485 of the Internal Revenue Code of 1954, 26 U.S.C. 7482 and 7485, in pertinent part provide:

> Section 7482(a). The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.
>
> Section 7485(a). Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 7483 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a notice of appeal in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer—
>
> (1) * * * [files] a bond in a sum fixed by the Tax Court not exceeding double the amount of the * * * deficiency * * * .

Section 1291 of the Judicial Code, 28 U.S.C. 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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1. Without denying the existence of the unique and unfair trilemma which the court of appeals' refusal to review has posed for the Ryans (and for any private Tax Court litigants in the future), the Commissioner rejects the applicability, in a civil tax controversy, of the salutary principles underlying the *Cohen* doctrine that finality is to be given a "practical rather than a technical construction," 337 U.S. at 546. The rejection is based on the sweeping contention that

these principles simply do "not extend to interlocutory discovery orders of the kind involved here," (Br. in Opp. 4), because, supposedly, "this Court has held, both before and after *Cohen,* that an order compelling testimony over a claim of Fifth Amendment privilege is not appealable." (*Ibid.*) Absolutely no direct authority, however, is cited for this broad claim, and the Commissioner can only point—as merely suggesting that conclusion—to one 70-year-old civil antitrust case and two criminal cases, only one of which was decided after *Cohen* (Br. in Opp. 4-5).*

It is thus instructive to note that following this Court's *Cohen* decision in 1949, its emphasis on the concept of finality as a requisite for appeal has focused on the concern about the effect of delay upon the administration of *criminal* justice (see *e.g., DiBella* v. *United States,* 369 U.S. 121 (1962); *United States* v. *Ryan,* 402 U.S. 530, 533 (1971)) and has embodied warnings that the "concept of finality as a condition for review . . . need not invite self-defeating judicial construction," 369 U.S. at 125.

Moreover, the only relevant post-*Cohen* authority suggested by the Commissioner as barring review of the Tax Court's civil discovery order, *United States* v. *Ryan, supra,* is also a *criminal* case, and even as such, it enunciated no standards incompatible with the court of appeals' review of the Tax Court's discovery order. Indeed, the rationale of the *Ryan* case, as unanimously articulated by this Court in 1971, would require review by the Seventh Circuit.

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* *Alexander* v. *United States,* 201 U.S. 117 (1906); *Cobbledick* v. *United States,* 309 U.S. 323 (1940); *United States* v. *Ryan,* 402 U.S. 530 (1971).

In *Ryan,* this Court granted certiorari to review a court of appeals' reversal of the denial of a motion to quash a grand jury subpoena duces tecum issued to Ryan under the Federal Rules of Criminal Procedure. Ryan argued that without the immediate review he had been afforded by the court of appeals, he would be forced to comply with the subpoena, and, therefore, be powerless to "avert the mischief of the order," *Perlman* v. *United States,* 247 U.S. 7, 13 (1918). This Court, without addressing the merits of the controversy, reversed the court of appeals, observing that it had "consistently held that the necessity for *expedition in the administration of the criminal law* justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." 402 U.S. at 533. (emphasis added) Thus, in *Ryan,* this Court held that in the administration of criminal justice, immediate review of a discovery order was impermissible, since Ryan could "avert the mschief of the order" by "resistance to that order with the concomitant possibility of an adjudication of contempt *if his claims are rejected on appeal.*" 402 U.S. at 533 (emphasis added).

Clearly then, even in *criminal* cases this Court's rule on finality as a condition for appeal is based on the requirement that the adverse effect of the challenged order upon a citizen would be contingent upon his "claims [being] rejected *on appeal*"—a requirement which can only be fulfilled if there is available a truly viable mechanism to prevent irreparable injury *pending* the appeal. If it were otherwise, the "mischief

of the order" would be visited upon the citizen not only if his claim were rejected on appeal—but even if it were in fact upheld by the appellate court.

This, of course, is precisely the distinction between the position of Ryan as the recipient of a grand jury subpoena duces tecum who took an appeal to the Ninth Circuit from the denial of his motion to quash—and Mr. and Mrs. Ryan as private Tax Court litigants, who are ordered to produce information by an order which they claim violates their fundamental rights. The district court's order in 1969 was not immediately appealable by Ryan as the recipient of a grand jury subpoena because he had available to him a truly viable mechanism which would have permitted the "mischief of the order" to be suspended until the appellate court either sustained or rejected his claims in the appeal from the district court's contempt adjudication. But the Ryan family, as Tax Court litigants, can only avoid the irreparable "mischief of the order" if the Tax Court imposes solely the contempt sanction. Because of the existing restrictions of the Internal Revenue Code and the Federal Rules of Appellate Procedure on stays pending appeals from Tax Court decisions, if the Tax Court were to impose any of the numerous *other* sanctions available to it under its new Rules (sanctions of the type which were and are *not* available to a district court in a criminal case such as *United States* v. *Ryan, supra*) and thus generates a multi-million dollar irremediable assessment and collection event, the Ryans, except by posting an even larger multi-million dollar bond, could not avoid the damage from the order even if their objections to it were *upheld* in the appeal from the ultimate Tax Court judgment. That is simply not an effective mechanism

to prevent irreparable injury from the discovery order pending appeal—a result as much at odds with the rationale of the *Ryan* case as it is with the *Cohen* doctrine—and additionally an impermissibly crushing burden upon the Ryans' exercise of their fundamental rights.

Accordingly, we submit that nothing in the jurisprudence of finality as a condition for review—even in the administration of *criminal* justice, where the interests of expedition are far more compelling—can justify a citizen's exposure to the kind of irreparable damage which the Ryans might suffer prior to any effective opportunity for appellate review. It follows that such a result is even less justifiable in the context of the *civil* litigation between a citizen and the sovereign, and especially in a Tax Court controversy, since (1) any delay occasioned by the initiation of appellate review of a discovery order by private litigants who claim the order violates their basic rights works essentially against the appellants by delaying action on their petition and (2) such delay can hardly damage the sovereign, since its basic interest is monetary, and if the petitioner loses the discovery order appeal and the government ultimately prevails on the merits of the basic tax controversy in the Tax Court, the sovereign is fully protected and recompensed for the delay by receiving further interest on whatever tax may be assessed.

2. The Commissioner would justify the exorbitant price which the court of appeals' decision would require the Ryans to pay simply to obtain a meaningful review of their constitutional claim (in the event a "non-contempt" sanction is imposed by the Tax Court) by claiming that had the Ryans sued in the district

court they would have had to pay the alleged tax deficiencies anyway. The argument is irrelevant. The fact is that the Ryans chose *not* to litigate in the district court but in the Tax Court, and indeed, at a time long before the new Rules of the Tax Court were in effect or even thought of. The Tax Court is an alternative method for challenging alleged tax deficiencies set up precisely so that taxpayers faced with staggering claims such as those assessed against the Ryans would *not* have to suffer enormous losses before a proper adjudication of their challenge to the assessment. The decision of the court of appeals, in conjunction with the provisions of the Internal Revenue Code and the Federal Rules of Appellate Procedure, would effectively deprive the Ryans of the intended advantages of the Tax Court route, even if the Tax Court's discovery order were ultimately held erroneous.*

CONCLUSION

The decision of the court of appeals is demonstrably incompatible with the principles of the *Cohen* doctrine, and with even the strict standards of finality in *crim-*

* The subsequent and *ex parte* immunity order—pending appeal on the grounds that it is not, in fact, co-extensive with the privilege against self-incrimination and is otherwise invalid—in no way obviates the need for review of the Seventh Circuit's refusal to review the Tax Court discovery order. This is because the express basis for the Tax Court ruling was *that the petitioners were not entitled to the privilege in the first place.* Thus, the Ryans are under a continuing obligation to comply with the Tax Court's discovery order—and are exposed to sanctions if they fail to do so—totally irrespective of the resolution of the immunity controversy. Accordingly, the present existence of that immunity order in no way diminishes the immediacy or importance of the issues raised by the court of appeals' ruling, nor the need for their resolution by this Court.

inal cases expressed as recently as 1971 in the *Ryan* case. More importantly, it is a case of first impression arising from the initial intermeshing of the new Tax Court discovery rules with the special limitations of the Internal Revenue Code and the Federal Rules of Appellate Procedure relative to review of Tax Court decisions; it substantially alters the posture of taxpayers before the Tax Court in a manner not anticipated—and probably not intended—by the Congress or the Tax Court; and endangers the fundamental rights of the litigants. In all respects the decision presents important and inevitably recurring questions warranting review by this Court.

Respectfully submitted,

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October 6, 1975